a legitimate subject for comment in argument. He lays down the rule that in the absence of express prohibition every fact which comes to the jury during the progress of the trial in a legal manner, and which might influence their minds, is a subject of comment by counsel in their arguments. As to the argument that the defendant's wife was not a competent witness, and that by this circumstance the case is distinguishable from cases where a party omitted to produce some witness whose testimony might have been enlightening, Mr. Justice Brewer says that while it is true that the wife could not have been called upon to give testimony, yet, on the other hand, she herself was testimony, and material testimony. He suggests that her non-appearance in court was suspicious, just as it would be a suspicious circumstance if it were proved that at the time of the murder the defendant had been in possession of a knife of a particular make, marked in a certain way, and that on the very morning of the trial a knife of the same make had been seen in the possession of the defendant, but that nevertheless the defendant had not produced the knife. The omission to produce the knife would be a significant fact, and one upon which the prosecuting attorney would be at liberty to comment. In the same way, the fact that the defendant's wife remained away from court, although it had been proved that she was near at hand where it would have been the easiest thing in the world for her to come, was a fact which would naturally affect the judgment of men, and in respect to which the district attorney was at liberty to comment.

It may be admitted that the point is a close one, and that the argument on each side is pretty strong. Perhaps the acknowledged tendency of the law to make presumptions in favor of the innocence of the accused in a criminal trial ought to turn the scale. The case where a party has it peculiarly within his own power to produce a witness whose testimony might elucidate the matter in issue is really not analogous. In such a case it is always conceivable that the witness might have proved the defendant's innocence. Therefore, since it might have been so much for his interest to produce the witness, the omission to do so raises a very strong presumption that the testimony would have been unfavorable to him. But in this case the presence of the wife in court could not have helped the defendant, while, on the contrary, it might have injured him seriously. If the witnesses for the government had failed to identify the prisoner's wife, there would be still nothing to show that some other woman was not with him at the time of the murder. On the other hand, if the woman had been identified, the identification would have furnished very convincing proof of the prisoner's guilt. The prisoner had everything to lose and nothing to gain by causing his wife to appear in court. It would hardly seem fair, then, to permit the prosecuting attorney to try to influence the minds of the jury by comment upon the defendant's omission to do what he was under no obligation to do, and which, had he done it, might have worked him very great harm, without any chance of its benefiting him at all. Upon this ground the opinion of the majority of the court would appear to be right.

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NATURE OF A LANDOWNER'S RIGHT TO NATURAL GAS. — *Hague* v. *Wheeler*, 27 Atl. Rep. 714, was a bill by the owners of two plots of land overlying gas-bearing strata to enjoin the defendants, owners of a third adjacent piece of land, from allowing a gas well upon their premises to go

to waste. It was conceded that the defendants made no use of the gas, and the circumstances were held to negative malice in the sense of evil motive, the well having been drilled under an abortive agreement for the sale of gas to one of the plaintiffs. It seems also to have been conceded that the loss of the gas did cause *damnum* to the plaintiffs. The case was of the first impression. Under these circumstances, Noyes, P. J., in the court below, after a hasty examination of authorities, came, upon the same reasoning as that employed by the New Hampshire courts on the subject of percolating water, to substantially the same result, — apparently without consulting the New Hampshire authorities. In *Basset* v. *Company*, 43 N. H. 569, and other cases since then, the New Hampshire courts have decided — one can use the language of Noyes, P. J., in *Hague* v. *Wheeler* — that "The rights of adjoining owners . . . are qualified and correlative." "The well is a mere conduit by which the gas [water] is enabled to escape." "The landowner's right . . . must of necessity be limited . . . by the requirement of ordinary care for the protection of others interested in common with himself." Or, in the language of the New Hampshire court in deciding a point of law neatly put before it by a referee (64 N. H. 294), the use must be reasonable; and "in determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered." The dissent of so eminent a judge as Lord Wensleydale (*Chasemore* v. *Richards*, 7 H. L. Cas. 349, 380) goes to show that the case of percolating water is an extremely close one; the New Hampshire rule is stated upon good authority to work well. Under these circumstances it would seem that there was something more than chance in the result in the court below. Natural gas is a mineral product of great value, apparently not, owing to its elusive nature, the subject of property before drawn from the well. Unless strong reasons of expediency can be shown for such lack of control resulting in such waste, it should not be allowed. The doctrine which would control its use lies ready to hand, and comes up naturally and independently in the mind of the trial justice; it has worked well when applied to a case where the reasons for lack of control are stronger; and such regrettable waste might well be stopped by its application.

But the court above reversed this decision, drawing what seems, speaking with all due deference to so good a court, so familiar with the questions which natural gas has presented, to be a doubtful analogy between this case and that of "the owner of timber" who 'may pile it in heaps and burn it . . . notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money." They describe the rule which would justify the injunction as requiring an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage if his neighbor was so situated that he could profit by it." They call this, at the most, a "moral obligation . . . not enforceable by civil process." Now, the analogy to timber might, if fully carried out, justify instead of dispose of the claim for injunction; for if the right to gas is of such an absolute nature, the defendants' well must draw molecules of gas from the plaintiff's strata, and so cause a "conversion." But such reasoning is impracticable. The analogy to percolating water is unmistakable, and the case is even a closer one for decision. It is to be regretted that the court above could not see its way to prevent such waste of valuable

powers of nature. The modern tendency is to lean in favor of control where possible, and these "minerals *feræ naturæ*," as the Pennsylvania courts have called natural gas and petroleum, are well worth controlling. On the other hand, it is a difficult matter to say what use of percolating water, oil, or natural gas is and what not injurious to the rights of others; and the courts may well hold, as the Pennsylvania court has done, that they will not run the risk of too much control for the sake of a doubtful benefit.

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JUDICIAL NOTICE — WAIVER OF SOVEREIGNTY. — In *Mighell* v. *The Sultan of Johore*, a very recent English breach of promise case, the defendant has procured the judgment of the Court of Appeal confirming the dismissal of the action. Mr. Justice Wright, before whom the case originally came in chambers, inquired of the Marquis of Ripon, Secretary of State for the Colonies, concerning the defendant's status, and received the answer that Johore was an independent State, and the defendant (Mr. Albert Baker) its reigning sovereign. So far the case follows *Taylor* v. *Barclay*, 2 Sim. 213. The next step is interesting. The plaintiff endeavored to go into the evidence upon the subject, and cited a case in which the courts of Malacca had held that the defendant's predecessor was liable to be sued. In *The Charkieh*, L. R. 4 Ad. & Eccl. 59, Sir Robert Phillimore had based his decision, that the Khedive of Egypt was not a sovereign, upon general history, firmans, treaties, and an answer of the Foreign Office, devoting the larger part of his judgment to the first three grounds, but fortunately reaching the same conclusion as the Foreign Office. Hence, the plaintiff's counsel argued, the court ought to investigate the question, and decide the status of Johore for themselves. But Lord Esher, M. R., delivering the unanimous judgment of the Court of Appeal, disposes of this first point. The declaration of the Queen's Secretary of State is final; behind it the Queen's judges do not go.

The case furnishes a good illustration of the nature of judicial notice. The judge does not decide upon what he believes to be the fact, or upon what he knew about at the hearing, but a fact which from its nature can be ascertained without the assistance of counsel or pleadings is finally decided by another branch of the government, in whom by recognized principles of public law the decision of that question rests. The precise point to be decided is not the fact of sovereignty, but the relation of comity, which, independent of any facts, creates the exemption of the person recognized as a friendly sovereign. And the decision of that question by (in this case) the Colonial Office is final.

The plaintiff's second point is a weak but suggestive one. The argument was that the Sultan, by residing in England *incognito*, and there winning the plaintiff's affections, had waived his sovereignty and submitted to the jurisdiction of the courts; that he could not, in the language of Sir Robert Phillimore in *The Charkieh*, "assume the character of a trader, . . . and when he had incurred an obligation to a private subject, . . . throw off his disguise, and claim for the first time all the attributes of his character." It may well be doubted whether the alliance of a sovereign is not an act of State over which the courts should not take jurisdiction even when the defendant waives his right. But even if it be a private act, there is no force in any estoppel or waiver which can make a sovereign not a sovereign, or bar him from insisting upon his rights at all